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No. 88-1032

IN THE

Supreme Court of the United States

October Term, 1988

JOSEPH JUTKOFSKY,

Petitioner,

against

ALDO MAESTRI and GLORIA ZOOK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to the Petition for a Writ of Certiorari

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Questions Presented.

I.

Whether the Second Circuit Court of Appeals rendered a decision in conflict with decisions of this Court or other federal appellate courts in holding that a New York State town judge acted with a clear absence of jurisdiction, and thus lost his judicial immunity, when the judge purported to preside over a criminal matter that was not within his subject matter jurisdiction and which occurred in a distant town?

II.

Whether the Second Circuit Court of Appeals rendered a decision in conflict with decisions of this Court or other federal appellate courts in holding that a judge's knowledge that he is acting without jurisdiction is a nonconclusive factor to be considered in determining whether the judge acted in a clear absence of jurisdiction?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988.

JOSEPH JUTKOFSKY,

Petitioner,

against

ALDO MAESTRI AND GLORIA ZOOK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to the Petition for a Writ of Certiorari.

Opinions Below.

Jutkofsky's Petition for a Writ of Certiorari correctly sets forth the opinions of the Second Circuit and the orders entered in the Northern District of New York. However, Jutkofsky's Petition fails to refer to the oral opinion rendered by Judge McAvoy in the District Court. We have annexed hereto as Exhibit "A" a transcript of Judge McAvoy's oral opinion.

Statement of the Case.

This is a civil rights action pursuant to 42 U.S.C. §§1983 and 1985. Aldo Maestri and Gloria Zook (plaintiffs-respondents) allege that petitioner Joseph Jutkofsky, a New York State town judge, was a participant in a conspiracy to incarcerate Maestri and Zook on false charges of harassment and trespassing. The harassment charges resulted from allegations that Maestri and Zook used profanity (though admittedly not in a threatening manner) toward one of the defendants. When presented with the profanity accusations, Jutkofsky assumed jurisdiction of the case even though he had no statutory authority to do so. He then ordered Maestri and Zook to jail awaiting trial for a period which exceeded the maximum period allowed under New York law.

The underlying incident occurred at the home of Gloria Zook in the Town of Germantown, New York, on April 17, 1983. At that time, Gloria Zook was involved in a legal dispute with her ex-husband, defendant Gordon Zook, concerning the right to possession of the Zook house. In spite of the legal dispute, Gordon Zook had authorized Ralph DelPozzo, Sr., a real estate broker, to sell the house. Gloria Zook opposed the sale of the house.

On April 17, 1983, Gloria Zook and her friend, Aldo Maestri, were near the house when they saw defendant Ralph DelPozzo, Jr. on the property. DelPozzo, Jr. was a real estate salesperson working for his father's real estate company, and he was showing the house to prospective purchasers. Gloria Zook had a short conversation with DelPozzo, Jr. and the prospective purchasers. Apparently interpreting Ms. Zook's objection to the sale of the house as interference with his business, DelPozzo, Jr. executed criminal complaints against Maestri and Zook. DelPozzo,

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> warrants under Section 120.30(2) of the [New York] Criminal Procedure Law."

Appendix on Behalf of Plaintiff-Appellants to Second Circuit, pp. 226-27.

In the District Court, Jutkofsky moved for summary judgment based upon judicial immunity. Although the District Judge was "a bit uneasy and certainly not very happy with the occurrences," he felt constrained by his reading of the case law to grant summary judgment in favor of Jutkofsky. The Second Circuit Court of Appeals held that Jutkofsky acted in a clear absence of jurisdiction, and thus, reversed the uneasy decision of the District Court:

> On the facts which we take to be undisputed, we find that Jutkofsky knowingly acted in the clear absence of territorial jurisdiction when he signed the arrest warrants and caused the incarceration of Maestri and Zook. No reasonable Town Judge would have thought himself to have had jurisdiction over a non-adjoining town. . .
>
> For a judge to assume authority outside the geographic bounds of his office is the kind of clear, judicial usurpation which cannot be condoned by any grant of immunity. No public policy would be served by granting immunity for such arrogant excesses of authority.

Maestri v. Jutkofsky, No. 88-7060 (2d Cir. Oct. 20, 1988), slip op. at 8a.[1]

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[1]All page cites herein to the Second Circuit's *Maestri v. Jutkofsky* decision are to the slip opinion as reprinted in Jutkofsky's Petition for a Writ of Certiorari.

Summary of Argument.

Judges are not entitled to immunity for judicial acts committed in a clear absence of jurisdiction. *Stump v. Sparkman,* 435 U.S. 349 (1978). Case law indicates that judges who act in the absence of subject matter jurisdiction are acting in a clear absence of jurisdiction and are not entitled to judicial immunity. *Id.; Bradley v. Fisher,* 80 U.S. (13 Wall. 335) (1872).

Decisions of this Court and other federal appellate courts have consistently indicated that a judge's knowledge that he is acting without jurisdiction is a factor in determining whether the judge acted in a clear absence of jurisdiction. *Id., see, also, Turner v. Raynes,* 611 F.2d 92, 95 (5th Cir. 1980); *Rankin v. Howard,* 633 F.2d 844, 849 (9th Cir. 1980) (overruled on other grounds in *Ashelman v. Pope,* 793 F.2d 1072 (9th Cir. 1986)); *O'Neil v. Lake Oswego,* 642 F.2d 367, 371 (9th Cir. 1981) (concurring opinion by Circuit Judge Anthony M. Kennedy). The decisions relied upon by the petitioner suggesting that a judge's motivation should play no role in the immunity analysis involved judges who properly had subject matter jurisdiction, and therefore, stand for nothing more than the undisputed proposition that a judge who has subject matter jurisdiction does not lose immunity because he acts with improper motivation.

Because Jutkofsky knowingly acted with an absence of jurisdiction, he is not entitled to immunity. The Second Circuit has not condoned analysis of a judge's motivation; it has done nothing more than consider the judge's knowledge of his jurisdiction. The policy underlying the doctrine of judicial immunity does not require a grant of immunity where a judge deliberately acts without jurisdiction.

ARGUMENT.

I.

THE SECOND CIRCUIT DECISION, HOLDING THAT JUTKOFSKY ACTED IN A CLEAR ABSENCE OF JURISDICTION, IS FULLY CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS.

A. The Second Circuit Correctly Applied Principles Established by this Court.

It is well settled that a judge is entitled to judicial immunity only for actions which meet both of two tests: (1) the act must have been a "judicial act," and (2) the act must have been committed in connection with a matter within the judge's jurisdiction. *Stump v. Sparkman,* 435 U.S. 349, 357-58 (1978). A judge who purports to preside over a matter outside his jurisdiction is exercising only "usurped authority," and is, thus, not entitled to immunity for such acts. *Bradley v. Fisher,* 80 U.S. (13 Wall. 335), 352 (1872).

Jutkofsky admittedly seeks judicial immunity for acts that he knowingly committed without jurisdiction. In seeking such immunity, Jutkofsky relies upon the seminal case of *Bradley v. Fisher, supra,* in which this Court first made the distinction "between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists." *Bradley, supra,* 80 U.S. at 352-53. As set forth in *Bradley,* judges of general jurisdiction may not be held liable in civil actions for judicial acts committed "in excess of their jurisdiction," but they may be held fully liable for judicial acts committed in "the clear absence of all jurisdiction over the subject-matter."

Bradley, supra, 80 U.S. at 351. In its modern pronouncement on the doctrine of judicial immunity, this Court reiterated the principle that judicial immunity applies to acts committed in excess of jurisdiction, but not to acts committed in the clear absence of all jurisdiction. *Stump v. Sparkman,* 435 U.S. 349, 357-58 (1978).

In distinguishing between acts committed in mere excess of jurisdiction from those committed in a clear absence of jurisdiction, this Court has consistently indicated that judicial immunity applies only if the judicial acts pertain to matters over which the judge is empowered to preside pursuant to pertinent state law. The *Bradley* court focused on subject matter jurisdiction and plainly stated that "[w]here there is clearly no jurisdiction over the subject matter any authority exercised is usurped authority" for which "no excuse is permissible" *Bradley, supra,* 80 U.S. at 351-52. Moreover, in *Stump,* this Court emphasized that the "necessary inquiry . . . is whether at the time he took the challenged action [the judge] had jurisdiction over the subject matter before him." *Stump, supra,* 435 U.S. at 357. In *Stump,* the Court analyzed the pertinent Indiana statutes and cases setting forth the jurisdiction of Judge Stump. The Court upheld Judge Stump's claim of immunity only after concluding that the pertinent Indiana statute gave Judge Stump the authority to preside over the matter at issue. *Id.*

In the present case, the Second Circuit focused upon subject matter jurisdiction (as required by this Court) and analyzed the pertinent New York statutes to determine whether Jutkofsky possessed jurisdiction of the Maestri-Zook incident. The statutory analysis of the Second Circuit in the present case is directly analogous to this Court's statutory analysis of Judge Stump's jurisdiction. *Stump, supra,* 435 U.S. at 357. Because Jutkofsky lacked

subject matter jurisdiction, the Second Circuit correctly concluded that he is not entitled to judicial immunity.

B. Other Federal Appellate Courts have Consistently Denied Judicial Immunity in Analogous Cases.

Jutkofsky's argument that the decision of the Second Circuit is in conflict with decisions of other federal appellate courts appears to be based solely upon the fact that the Second Circuit considered Jutkofsky's knowledge that he lacked jurisdiction as one factor in determining whether Jutkofsky acted in a clear absence of jurisdiction. However, it is clear that the Second Circuit would have found Jutkofsky to be acting in a clear absence of jurisdiction even if it had not considered Jutkofsky's knowledge of his absence of jurisdiction. *Maestri v. Jutkofsky, supra,* pp. 7a-8a. Moreover, although Jutkofsky correctly points out that a judge's improper motivation will not, itself, deprive the judge of judicial immunity, he fails to point out that this Court and other federal appellate courts have consistently indicated that a judge's knowledge that he is acting without jurisdiction will result in a denial of judicial immunity. *See,* Point II, *infra.*

More importantly, Jutkofsky has not, and cannot, refer the Court to any analogous cases which resulted in a finding of judicial immunity. The Second Circuit correctly pointed out that Jutkofsky cannot support his assertions by reference to other prior decisions:

> "Finally, Jutkofsky has not cited, nor have we found, any case in which a judge who had exercised authority outside the territory properly within his jurisdiction was nevertheless held to be entitled to judicial immunity."

Maestri v. Jutkofsky, supra, p. 8a.

The weight of authority simply does not favor Jutkofsky. In all cases in which courts have found that judges acted without statutory subject matter jurisdiction, the judges have been deprived of immunity. For example, in *Manning v. Ketcham,* 58 F.2d 948 (6th Cir. 1932), the court determined that a judge who held an inquiry without appropriate authority under state law was not entitled to immunity. In *Manning,* the Sixth Circuit set forth its reliance upon *Bradley, supra,* as follows:

> "When a judge acts in the clear absence of all jurisdiction, i.e. of authority to act officially over the subject-matter in hand, the proceeding is *coram non judice.* In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Such has been the law from the days of the case of The Marshalsea, 10 Cok 68. It was recognized as such in *Bradley v. Fisher,* 13 Wall. (80 U.S.) 335, 351, 20 L. Ed. 646. In *State ex rel. Egen v. Wolever,* 127 Ind. 306, 26 N.E. 762, 763, the Court said: 'the converse statement of it is also ancient. Where there is no jurisdiction at all, there is no judge; the proceeding is as nothing.'
>
> * * *
>
> When the judge acts illegally without the limits of his jurisdiction, he becomes a trespasser, and is liable in damages as such."

Manning v. Ketcham, 58 F.2d 948, 949 (6th Cir. 1932) (citations omitted).

Similarly, in *Brewer v. Blackwell,* 692 F.2d 387 (5th Cir. 1982), the court found that Louisiana law permitted the Justice of the Peace only to issue bail for criminal cases, but not to conduct trials of criminal cases. Therefore, the court found that the judge acted "in clear absence of jurisdiction" in conducting such a trial. 692 F.2d at 397. *See, also, Lynch v. Johnson,* 420 F.2d 818 (6th Cir. 1970) (judge of Kentucky Fiscal Court lacked immunity for imprisonment of plaintiff because the Fiscal Court had no authority for such criminal matters); and *Lucarell v. McNair,* 453 F.2d 836 (6th Cir. 1972) (juvenile court referee had no power to incarcerate and, thus, was not entitled to judicial immunity).

C. Established Case Law in the Second Circuit and New York Courts Support the Challenged Decision.

The challenged decision does not constitute a departure from established case law in the Second Circuit. In its cases concerning judicial immunity, the Second Circuit has consistently undertaken careful analysis of the judge's statutory authority to commit the challenged acts. The case of *Heimbach v. Village of Lyons,* 597 F.2d 344 (2d Cir. 1979) is particularly instructive. In *Heimbach,* a New York village judge was accused of maliciously signing criminal arrest warrants. The Second Circuit upheld the judge's claim of immunity only after determining that New York law (C.P.L. §§100.55 and 120.20(1)) provided the judge with subject matter jurisdiction to issue the criminal arrest warrants at issue. 597 F.2d at 346. In *Heimbach,* the Second Circuit clearly suggested that, if the village judge had overstepped the bounds of his jurisdiction under the New York Criminal Procedure Law (as did Jutkofsky in the present case), he would not have been entitled to judicial immunity. *Id.*

Similarly, in *Fanale v. Sheehy,* 385 F.2d 866 (2d Cir. 1967), the Second Circuit upheld the finding of judicial immunity only after determining that a New York town judge had jurisdiction to try a case of assault pursuant to the New York Criminal Procedure Law. 385 F.2d at 868. *See, also, Green v. Maraio,* 722 F.2d 1013 (2d Cir. 1983) (county court judge accused of tampering with transcript of court proceedings had jurisdiction of the matter and, therefore, was entitled to immunity), and *Zarcone v. Perry,* 572 F.2d 52 (2d Cir. 1978) (no discussion of immunity in case where Second Circuit upheld an award of punitive damages against a New York traffic judge who summoned a coffee vendor into his chambers for selling "putrid" coffee).

Other New York cases demonstrate with striking clarity that a judge will enjoy immunity from suit only if state law permits the judge to preside not only over the particular class of cases in issue, but also over the particular parties and the particular case involved. In *Weiss v. Feigenbaum,* 558 F. Supp. 265 (E.D.N.Y. 1982), the district court addressed the question of whether a judge loses his immunity by failing to disqualify himself as a result of his personal interest in the case, as required by the New York Judiciary Law, §14. The court clearly stated that a New York judge who fails to disqualify himself as required by state law would be acting in "the clear absence of jurisdiction" pursuant to the *Stump* and *Bradley* decisions. 558 F. Supp. at 272. *Accord, LaPier v. Deyo,* 100 A.D.2d 710, 474 N.Y.S.2d 597 (3d Dept. 1984).

D. Under New York Law, Jutkofsky Lacked Subject-Matter Jurisdiction of the Maestri-Zook Incident.

It is settled that a judge's jurisdiction must be determined by reference to state law. *Manning v. Ketcham,* 58

F.2d 948 (6th Cir. 1932). Under New York law, a town justice who purports to issue an arrest warrant for a criminal act outside the judge's geographic jurisdiction does so without subject matter jurisdiction of the matter, and the judge's actions are void. *People v. Epstein*, 47 A.D.2d 661, 661-62, 364 N.Y.S.2d 38 (2d Dept. 1975). As a result, the Second Circuit correctly concluded that Jutkofsky is not entitled to immunity.

II.

THE SECOND CIRCUIT DECISION, WHICH TOOK INTO CONSIDERATION JUTKOFSKY'S KNOWLEDGE THAT HE WAS ACTING WITHOUT JURISDICTION, IS FULLY CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS.

A. Established Case Law Indicates that a Judge's Knowledge that he is Acting Without Jurisdiction Deprives the Judge of Judicial Immunity.

Decisions of this Court and other federal appellate courts support the Second Circuit's consideration of Jutkofsky's knowledge of his lack of jurisdiction. If Jutkofsky had subject matter jurisdiction of the incident, he clearly would not be deprived of judicial immunity solely because his actions were committed with malice. *Stump v. Sparkman, supra,* 435 U.S. at 357. However, the Second Circuit correctly indicated that the state of Jutkofsky's mind is a factor in determining whether Jutkofsky acted in a clear absence of jurisdiction, and thus, whether judicial immunity is available to him.

In the seminal case of *Bradley v. Fisher,* this Court clearly stated that "when the want of jurisdiction is

known to the judge, no excuse is permissible." 80 U.S. (13 Wall.) at 352. The distinction set forth by the *Bradley* Court with respect to "excess of jurisdiction" and "clear absence of jurisdiction" specifically hinges upon the question of whether the judge is aware that his acts are beyond his jurisdiction. *Id.* For example, the *Bradley* Court stated that a court's clear absence of jurisdiction would be "necessarily known to its judge," and further sought to protect judges from wrong decisions made in the face of "difficult and embarrassing questions" pertaining to their jurisdiction. *Id.*

Federal appellate courts have reiterated the principle that a judge will not be immune for his commission of acts which he knows are beyond his jurisdiction:

> "A clearly inordinate exercise of unconferred jurisdiction by a judge—one so crass as to establish that he embarked on it either knowingly or recklessly—subjects him to personal liability."

Turner v. Raynes, 611 F.2d 92, 95 (5th Cir. 1980).

> "But when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost. . ."

Rankin v. Howard, 633 F.2d 844, 849 (9th Cir. 1980) (overruled on other grounds in *Ashelman v. Pope,* 793 F.2d 1072 (9th Cir. 1986)).

In addition, during his tenure as Circuit Court Judge, Supreme Court Justice Anthony M. Kennedy specifically stated that an "intentional or reckless disregard of the limits on judicial authority" will deprive a judge of judi-

cial immunity. *O'Neil v. Lake Oswego,* 642 F.2d 367, 371 (9th Cir. 1981) (concurring opinion).

Consistently with the foregoing authorities, the Second Circuit considered Jutkofsky's knowledge of his absence of jurisdiction as a nonconclusive factor in determining whether Jutkofsky acted in a clear absence of jurisdiction. *Maestri v. Jutkofsky, supra,* pp. 7a-8a. There is a substantial difference between considering a judge's knowledge of his jurisdiction and questioning his motivation. Contrary to Jutkofsky's suggestion, the Second Circuit did not question Jutkofsky's motivation and did not condone analysis of a judge's motivation in cases involving judicial immunity. As required by decisions of this court, the Second Circuit was careful to guard against undue scrutiny of a judge's state of mind. Indeed, the Second Circuit considered Jutkofsky's knowledge of his lack of jurisdiction only after first concluding that Jutkofsky acted in the clear absence of jurisdiction:

> "Because scrutiny of a judge's state of mind would hinder the adjudicatory process in the very manner that the judicial immunity doctrine is designed to prevent, a judge will be denied immunity only where it appears, first, that the judge acted in the clear absence of jurisdiction, and second, the judge must have known that he or she was acting in the clear absence of jurisdiction."

Id. p. 7a. The Second Circuit correctly pointed out that redress must be allowed "in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction." *Id.,* p. 8a.

B. The Cases Cited by Jutkofsky Concerning the Judge's Motivation Do Not Support his Position.

Jutkofsky's reliance upon dicta and limited quotations concerning a judge's state of mind is misplaced. Jutkofsky's petition quotes narrow passages from cases suggesting that a judge's motivation should play no role in the immunity analysis. Jutkofsky's Petition for a Writ of Certiorari, pp. 5-6. However, all cases quoted by Jutkofsky on this issue involved judges who properly enjoyed subject matter jurisdiction of the matters at issue. *Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 354 (judge possessed the power to bar attorneys from practicing before the court); *Stump v. Sparkman, supra,* 435 U.S. at 365 (Indiana law vested Judge Stump with power to act upon the petition); *O'Neil v. City of Lake Oswego,* 642 F.2d 367, 370 (9th Cir. 1981) (judge had jurisdiction over contempt charges); *Green v. Maraio,* 722 F.2d 1013, 1017 (2d Cir. 1983) (judge had subject matter jurisdiction of the criminal action); *Ashelman v. Pope,* 793 F.2d 1072, 1078 (9th Cir. 1986) (judge had subject matter jurisdiction of the criminal matter); *Holloway v. Walker,* 765 F.2d 517, 523 (5th Cir. 1985), *cert. denied* 474 U.S. 1037 (1985) (the judicial acts were not committed in clear absence of all jurisdiction).

The passages quoted by Jutkofsky from the foregoing cases stand for nothing more than the undisputed proposition that, if a judge properly has jurisdiction of the matter, he will not lose his immunity by acting with bad intent. It is significant to note that Jutkofsky has not quoted any passages, nor cited any cases, suggesting that a judge's knowledge of his lack of jurisdiction is irrelevant in determining whether the judge acted in a clear absence of jurisdiction. In view of the case law to the con-

trary, it is apparent that Jutkofsky can refer to no such authority.

III.

THE POLICY REASONS FOR THE DOCTRINE OF JUDICIAL IMMUNITY DO NOT SUPPORT THE ASSERTION OF IMMUNITY IN THIS CASE.

The major purpose of the doctrine of judicial immunity is to allow judges to freely exercise their authority without fear of reprisal by disappointed litigants. *Stump v. Sparkman, supra,* 435 U.S. at 364. Judicial immunity should be granted only when it facilitates this major purpose. "The Supreme Court has made it clear that the doctrine of immunity should not be applied broadly and indiscriminately, but should be invoked only to the extent necessary to effect its purpose." *Gregory v. Thompson,* 500 F.2d 59, 63 (9th Cir. 1974), *citing, Doe v. McMillan,* 412 U.S. 306 (1973).

The Second Circuit correctly concluded that the application of judicial immunity to the present case is not warranted by the policy of facilitating an independent judiciary. Jutkofsky already has demonstrated that he is not worthy of the authority and independence which normally accompanies judicial office.

In addition, the Second Circuit decision will not result in scrutiny of the motivation of judges and will not result in a rash of lawsuits against judges. Under the Second Circuit approach (and the approach of this Court), if the judge has jurisdiction of the matter, there will be no inquiry into the judge's motivation. Disappointed litigants cannot defeat immunity merely by alleging malice on the part of the judge.

Moreover, Jutkofsky's argument, if accepted, would expand the doctrine of judicial immunity far beyond what was imagined by any of the courts to address these issues. Under Jutkofsky's argument, it would never matter where the offense occurred; New York judges could preside over criminal matters occurring in Texas or Hawaii, without concern for jurisdictional constraints. Jutkofsky would immunize such judges no matter how far they overstep the bounds of their jurisdiction. It is submitted that such a result is not required by the policy underlying the doctrine of judicial immunity and that such a result would strike a blow to the rule of law.

Conclusion.

For the reasons set forth herein, respondents respectfully request that this Court deny petitioner's request for a Writ of Certiorari.

Respectfully submitted this 18th day of January 1989.

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Appendix A.

The Court: Well, in this case the Court is a bit uneasy and certainly not very happy with the occurrences, however, I do feel a constrain to follow the case law, although I do admit that this case is a four-square, predecessor, either decided by the Second Circuit or the Supreme Court (*sic*).

But when there is a question of judicial immunity, the judge's jurisdiction should be construed broadly because some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction.

In this case the Court finds that, and I think Mr. Massaroni indicated that there is no issue that the facts show that these acts were judicial acts. I'm going to uphold here in this case that the acts appear to be in excess of the jurisdiction involved. I can't say that the judge proceeded in a clear absence of jurisdiction.

Thank you, gentlemen.

Defendant should submit an order.